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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 453

UNITED STATES TRUST COMPANY OF NEW YORK, AS EXECUTOR U/W OF GEORGE H. BUNKER, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 12–15) is unreported. The opinion of the Circuit Court of Appeals (R. 27–29) is reported in 98 F. (2d) 734.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 10, 1938. (R. 30.) The petition for a writ of certiorari was filed October

31, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of a War Risk Insurance policy on the life of the decedent payable to his widow are required to be included in his gross estate under the provisions of Section 302 (g) of the Revenue Act of 1926.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are found in the Appendix, *infra*, pp. 15–19.

STATEMENT

The facts as stipulated (R. 22–23) and as found by the Board of Tax Appeals (R. 12–13) are substantially as follows:

The decedent, George H. Bunker, died on December 10, 1934. (R. 22.)

At the time of his death he held a life insurance policy issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. The designated beneficiary was the decedent's widow. (R. 12, 22.)

The Commissioner of Internal Revenue included in the decedent's gross estate for estate tax purposes the proceeds of this insurance, amounting to $10,000. By reason of this inclusion of the proceeds of this policy in the gross estate the total life in-

surance of the decedent exceeded the statutory exemption of $40,000 by $6,942.87, and a deficiency in tax in the amount of $944.31 was asserted. (R. 12-13, 22-23)

The Board of Tax Appeals held that the proceeds of the policy in question were properly included in the gross estate and sustained the Commissioner's determination of the deficiency in issue. Upon appeal the Circuit Court of Appeals affirmed the Board's decision.

ARGUMENT

The sole question in this case is whether there is required to be included in the decedent's gross estate the sum of $10,000 representing the proceeds of a War Risk Insurance policy taken out by the decedent and made payable to his wife. The question arises in this case only by virtue of the fact that when that sum is added to the proceeds of other insurance policies payable to named beneficiaries the total exceeds the statutory exemption of $40,000 granted by Section 302 (g) of the Revenue Act of 1926 (Appendix, *infra*, p. 15).

The Circuit Court of Appeals and the Board of Tax Appeals held that the proceeds of the War Risk Insurance policy should be included in the gross estate. The decision is in accord with *Bankers Trust Co.* v. *Commissioner,* 33 B. T. A. 746, and is not in conflict with any other decision of any Federal court.

It is clear that the proceeds of the policy in question are not exempt under any provision of the estate tax law. Section 302 (g) of the Revenue Act of 1926, *infra,* plainly requires the inclusion in the decedent's gross estate of the amount of all insurance proceeds under policies taken out by the decedent upon his own life, except that an exemption of $40,000 is allowed against the total proceeds payable to persons other than the executor. Prior statutes have contained similar provisions. See Section 402 (f) of the Revenue Acts of 1918 and 1921 (c. 18, 40 Stat. 1057, 1098; c. 136, 42 Stat. 227, 279), and Section 302 (g) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 305). The regulations of the Treasury Department have consistently construed Section 302 (g) and the corresponding provisions of other statutes as including all forms of life insurance without exception, and the reenactment of the statute without substantial change is persuasive evidence of legislative approval of the administrative construction.[1] *Morrissey* v. *Helvering,* 296 U. S. 344; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488; *Hassett* v. *Welch,* 303 U. S. 303.

[1] The regulation here involved is Article 27 of Regulations 80 (Appendix, *infra,* p. 18). For regulations under prior Acts, see Article 32 of Regulations 37 (1921 Ed.), Article 27 of Regulations 63 (1922 Ed.), Article 25 of Regulations 68 (1924 Ed.), and Article 25 of Regulations 70 (1926 and 1929 Ed.).

The petitioner does not argue otherwise but contends that the proceeds are exempt under Section 22 of the World War Veterans' Act of 1924 (Appendix, *infra,* p. 15), which provides in part—

> That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively, * * * shall be exempt from all taxation * * *.

It will be noted that this section was repealed by Section 3 of the Act of August 12, 1935 (Appendix, *infra,* p. 16). That section, which was made retroactive by Section 5 of the Act, *infra,* provides in part as follows:

> Payments of benefits due or to become due * * * shall be exempt from taxation * * *.

It is not believed, however, that the slight change in language affects the case in any way. In *Lawrence* v. *Shaw,* 300 U. S. 245, 249, this Court stated that the second statute was intended to clarify the former rather than to change its purpose, and in this case the same result should be reached, whether the first or the second statute is relied upon. Under the first statute it is provided that the "insurance" shall be exempt from "all taxation" and under the second that "Payments of benefits due or to become due" shall be "exempt from taxation". As applied to insurance, both statutes mean that no tax shall be imposed on the proceeds.

We submit the the court below properly held that the tax imposed in this case was not a tax on the proceeds of the pol cy or on the policy itself, but was an excise tax imposed upon the privilege of transferring the property at death. It is well-settled that the Federal estate tax is an excise tax imposed upon the transfer of property at death or upon what may reasonably be regarded as a substitute for such a transfer. See *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347; *Tyler* v. *United States,* 281 U. S. 497, 502; *Milliken* v. *United States,* 283 U. S. 15, 23, 24; *Porter* v. *Commissioner,* 288 U. S. 436, 444. And in *Chase Nat. Bank* v. *United States,* 278 U. S. 327, this Court not only held that the estate tax generally was an excise tax on the privilege of transferring property at death, but specifically held that to require the proceeds of insurance policies payable to named beneficiaries to be included in the gross estate was not to impose a tax on the proceeds or the policies. The inclusion of the proceeds of the War Risk Insurance policy in the gross estate, for the purpose of measuring the estate tax, accordingly does not involve imposing a tax on either the proceeds or the policy. Section 22 of the World War Veterans' Act (Appendix, *infra,* p. 15) forbids only a tax on the proceeds or the policy.

This conclusion is supported by *Murdock* v. *Ward,* 178 U. S. 139, in which it was held that the value of Federal bonds was properly included in

the measure of a Federal inheritance tax, notwithstanding the fact that the bonds were issued under a Federal statute exempting the bonds from all taxation. The Court there held that the promise of the Government to refrain from taxing the bonds was not a promise to refrain from imposing an inheritance tax, where the estate consisted of such bonds. On the same day as the decision in that case the imposition of a New York State inheritance tax on a transfer of Federal bonds, which by statute were exempted from all taxes imposed by the United States or any State, was upheld on the ground that the tax was laid on the privilege of acquiring property by inheritance and not upon the bonds themselves. *Plummer* v. *Coler,* 178 U. S. 115.

More recently the courts have held that since the gift tax is imposed upon the privilege of transferring property by gift and not upon the property itself (*Bromley* v. *McCaughn,* 280 U. S. 124, 136–137; *Burnet* v. *Guggenheim,* 288 U. S. 280, 287), a gift of United States bonds issued under a statute exempting the bonds, both as to principal and interest, from all taxation except estate or inheritance taxes is required to be included in the measure of the gift tax. *Hamersley* v. *United States,* 16 F. Supp. 768 (C. Cls.), certiorari denied, 300 U. S. 659; *Phipps* v. *Commissioner,* 91 F. (2d) 627 (C. C. A. 10th), certiorari denied, 302 U. S. 742; see also 112 A. L. R. 1441.

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The petitioner argues that those decisions do not apply for the reason that in this case there was no transfer of any property by virtue of any laws relating to inheritance, succession, descent, or transfer of the decedent's property, but that it passed solely by the contract of insurance with the Federal Government. But a similar argument was made by the taxpayer and was rejected by this Court in *Chase Nat. Bank* v. *United States, supra.* In that case the Court, in holding that the tax was imposed on the transfer and was not a direct tax, said (p. 337):

> But the plaintiffs say that the tax here must be deemed to be a tax on property because the beneficiaries' interests in the policies were not transferred to them from the decedent, but from the insurer, and hence there was nothing to which a transfer or privilege tax could apply. Obviously, the word "transfer" in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.

It is true that the contract of insurance in that case was made with a commercial insurance company and that in this case it was made with the

Federal Government, but we cannot see how that distinction affects the nature of the tax imposed.[3] In the *Chase Nat. Bank* case, as in this case, the payment of the proceeds depended upon the contract and not upon any state laws regulating the descent and distribution of property. If there was a transfer in that case, there was equally a transfer in this case; and if the tax imposed with respect to the life insurance proceeds in that case was not a direct tax, it is not a direct tax here.

The petitioner argues further that whether the tax be denominated a direct tax or an indirect tax, it is a tax on the proceeds of War Risk Insurance because the collection of the tax may use up the entire proceeds. It points to Section 315 (b) of the Revenue Act of 1926, as amended by Section 803 (c) of the Revenue Act of 1932, c. 209, 47 Stat. 169 (U. S. C., Title 26, Sec. 427 (b)), making the beneficiary of an insurance policy liable for any unpaid estate tax imposed with respect to the insurance, and to Section 315 (a) of the Revenue Act of 1926, as amended by Section 613 (b) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and by Section 809 of the Revenue Act of 1932 (U. S. C., Title 26,

[3] The petitioner does not argue that there were other differences in the two contracts which make the *Chase Nat. Bank* case, *supra*, inapplicable, and we can think of none that affect the applicability of that decision to this case. See *Lynch* v. *United States*, 292 U. S. 571, 576–577; *White* v. *United States*, 270 U. S. 175, 180; *Lewis* v. *United States*, 56 F. (2d) 563 (C. C. A. 3d).

Sec. 427)), making the tax a lien for ten years on the gross estate of the decedent. It also refers to Section 314 (b) of the Revenue Act of 1926 (U. S. C., Title 26, Sec. 426 (b)), which enables executors, after payment of estate taxes, to secure reimbursement of a proportionate part of the tax from beneficiaries of insurance policies over $40,000 in amount.

So far as the contention is based upon the liability of the beneficiary to the Government for unpaid taxes, the simple answer is that it has not been shown that any such liability will be enforced in this case. The executor is personally liable for the estate tax and it may be collected from any assets in his hands or any assets distributed to the beneficiaries, regardless of the nature of the property included in the gross estate. The estate tax is not an aggregation of separate taxes but a single tax based upon percentages of the net taxable value of the whole estate. *Guettel* v. *United States,* 95 F. (2d) 229, 230 (C. C. A. 8th), certiorari denied, October 10, 1938, No. 47, present Term. And, so far as the contention rests on the proposition that the beneficiary is liable to the executor for a proportionate part of the estate tax paid by the executor out of the assets in his hands, it is evident that this does not alter the character of the tax. It remains one imposed on the transfer and not on the property, whether or not the executor is reimbursed by the beneficiary of the insurance policy. Finally,

even if the tax should be paid out of the actual proceeds of the War Risk Insurance, this fact could not serve to show that the tax was imposed upon the proceeds rather than the transfer. *Plummer* v. *Coler, supra,* 138; see *United States* v. *Perkins,* 163 U. S. 625, 629–630.

The petitioner claims that there is a conflict between the decision of the court below in this case and decisions of various state courts holding that War Risk Insurance proceeds are not subject to state inheritance, estate or transfer taxes. It is obvious that whatever the state courts may have held as to the applicability of their state inheritance or transfer taxes to War Risk Insurance proceeds, their decisions on that question and the decision of the court below dealing with the question whether such proceeds may be included in the gross estate for Federal estate tax purposes cannot be said to present a direct conflict which this Court is called upon to resolve. The Federal estate tax law is based upon a concept of a transfer which differs from that commonly employed in state inheritance and estate tax laws, and is imposed because the decedent's death has transferred or brought into being property rights. See *Tyler* v. *United States, supra,* 503. The difference is disclosed by the very fact that those of the state courts which have held that their inheritance, estate or transfer tax did not apply to the proceeds of War Risk Insurance have done so not alone because of the exemption of the

Federal statute but also because the insurance proceeds did not pass from the decedent to the beneficiary under state laws of descent and distribution, but passed under the contract and the Federal law. See *Tax Comm.* v. *Rife*, 119 Ohio St. 83; *In re Estate of Harris*, 179 Minn. 450; *Watkins* v. *Hall*, 107 W. Va. 202; *Wanzell's Estate*, 295 Pa. 419. See also *In re Cross' Estate*, 152 Wash. 459; *Succession of Geier*, 155 La. 167. Whatever may be the rule in those States as to the necessity of having a transfer of property directly from the decedent in order to justify a state transfer tax, such a transfer is nat required to justify the Federal estate tax. *Chase Nat. Bank* v. *United States, supra*. It is significant that the New York death transfer tax, which is closely analogous to the Federal estate tax, has been held applicable to the payment of War Risk Insurance. *Matter of Sabin*, 224 App. Div. 702, reversing 131 Misc. 451; *Matter of Schaeffer*, 130 Misc. 436; *Matter of Dean*, 131 Misc. 125.

Petitioner suggests that hearings on the bill which subsequently became the Revenue Act of 1918 had begun when the War Risk Insurance Amendments Act of June 25, 1918 (c. 104, 40 Stat. 609), was passed, and that the Revenue Act of 1918 was the first statute to contain a provision for taxing insurance payable to specific beneficiaries (Section 402 (f)). Because of this, the petitioner urges that in exempting the proceeds of war risk insurance from tax Congress had in mind the estate tax.

It cites no legislative history in support of this view, and, indeed, the contention is contradicted by the implications of the Committee reports.[5] In any event, exemptions from taxation are strictly construed. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232; *Phipps* v. *Commissioner, supra; Bank of Commerce* v. *Tennessee*, 161 U. S. 134; *Millsaps College* v. *Jackson*, 275 U. S. 129. An asserted exemption will be denied unless it is granted by the statute in plain terms. *United States Trust Co. of New York* v. *Anderson*, 65 F. (2d) 575 (C. C. A. 2d), certiorari denied, 290 U. S. 683; *Phipps* v. *Commissioner, supra; Trotter* v. *Tennessee*, 290 U. S. 354.

The petitioner further suggests (Pet. 3) that the case is of great public importance in view of the fact that there were 596,832 War Risk Insurance policies outstanding on June 30, 1937. It is clear that those figures afford no indication as to how often the question involved in this case will arise in the future, for the reason that no insurance payable to specific beneficiaries is required to be

[5] The House Report (No. 576, 65th Cong., 2d. Sess.) is silent. The Senate Report (No. 428, 65th Cong., 2d Sess.) appends the testimony of Assistant Secretary of the Treasury Love before the Senate Committee on Finance who explained (p. 22) the exemption feature as designed simply to include allotments and allowances in the exemptions theretofore granted in the case of compensation and insurance (see Act of October 6, 1917, c. 105, 40 Stat. 398, sec. 311, cf. sec. 402). The Committee reports on this earlier bill do not discuss the exemption feature. See H. Rept. No. 130, S. Rept. No. 141, H. Rept. No. 197, 65th Cong., 1st Sess.

included in the gross estate unless the total exceeds $40,000. In view of that fact, and because only one other case involving this question has previously arisen (*Bankers Trust Co.* v. *Commissioner*, *supra*) we do not believe that the question is of general importance.

Finally, the constitutional question which the petitioner seeks to raise as to whether the United States may repudiate a contractual obligation is not involved in this case. The sole question is whether a statute exempting the proceeds of a War Risk Insurance policy from tax should be construed as prohibiting the inclusion of such proceeds in the gross estate of the decedent for estate tax purposes. In the court below, the Government relied wholly upon the construction of the statute, and that is all that the court decided.

CONCLUSION

The decision of the court below is correct and is not in conflict with any other decision. The petition should be denied.

Respectfully submitted.

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JAMES W. MORRIS,
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NOVEMBER, 1938.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, 71:

SEC. 302. [As amended by Sec. 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680.] [1] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated except real property situated outside the United States—

* * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

[U. S. C., Title 26, Sec. 411.]

World War Veterans' Act of June 7, 1924, c. 320, 43 Stat. 607, 613:

SEC. 22. That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV; and shall be exempt

[1] The amendment changed only the portion of Section 302 preceding the subdivisions and related to the exclusion of real property situated outside the United States.

from all taxation: *Provided*, That such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Titles II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable.

That the provisions of this section shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Title III of such Act of his interest in such insurance to any other member of the permitted class of beneficiaries.

(U. S. C., Title 38, Sec. 454.)

Act of August 12, 1935, c. 510, 49 Stat. 607, 609, amending World War Veterans' Act of June 7, 1924:

SEC. 3. Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. Section 4747 of the Revised Statutes and section 22 of the World War Veterans' Act, 1924, are hereby repealed, and all other Acts inconsistent herewith are hereby modified accordingly. The provisions of this section shall not be

construed to prohibit the assignment by any person, to whom converted insurance shall be payable under title III of the World War Veterans' Act, 1924, of his interest in such insurance to any other member of the permitted class of beneficiaries.

[U. S. C. Supp. III, Title 38, Sec. 454a.]

SEC. 5. That this Act shall take effect and be in force from and after its passage, but the provisions hereof shall apply to payments made heretofore under any of the Acts mentioned herein.

[U. S. C. Supp. III, Title 38, Sec. 454a.]

Treasury Regulations 70, promulgated under the Revenue Act of 1926:

ART. 27. *Insurance receivable by other beneficiaries.*—All insurance in excess of $40,000 receivable by beneficiaries other than the estate must be included in the gross estate of any decedent dying after the effective date of the Revenue Act of 1918, except that where the decedent died subsequent to the effective date of the Revenue Act of 1918, but prior to the effective date of the Revenue Act of 1924, the proceeds of insurance policies taken out by him upon his own life payable to beneficiaries other than to or for the benefit of the decedent's estate, are not includable in the gross estate if the beneficiary receiving the proceeds became such prior to the effective date of the Revenue Act of 1918, and thereby acquired, prior to the effective date of the Revenue Act of 1918, a vested interest in the proceeds of the policy under the State law governing the rights or interest of the beneficiary.

Insurance payable to beneficiaries other than the estate, or for the benefit of the es-

tate, need not be included in the gross estate of a decedent who died before the effective date of Title IV of the Revenue Act of 1918, but where, subsequent to September 8, 1916, such a decedent assigned a policy of insurance payable to or for the benefit of his estate, or caused it to be made payable to a specific beneficiary in contemplation of or intended to take effect in possession or enjoyment at or after his death, the entire proceeds should be included if such assignment or change in beneficiary did not amount to a bona fide sale for a fair consideration in money or money's worth. (See Articles 15 to 21, inclusive.)

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

Treasury Regulations 80 (1934 Ed.), promulgated under the Revenue Act of 1926, as amended by the Revenue Acts of 1928, 1932, and 1934:

ART. 27. *Insurance receivable by other beneficiaries.*—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the pol-

icies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

U. S. GOVERNMENT PRINTING OFFICE: 1938